SENATE JUDICIARY
Exhibit No. 10
Date: 2/16/15
Bill No. SB 262

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Via U.S. Mail & Email

Senator Debby Barrett, President of the Senate
Representative Austin Knudsen, Speaker of the House
All Legislators

RE: Letter Dated January 8, 2015 from Richard A. Simms

Dear Montanans:

This letter is provided in response to Richard A. Simms' letter dated January 8, 2015, in which Mr. Simms mischaracterized and improperly cited Montana and federal law as related to the Confederated Salish and Kootenai Tribes (CSKT) Water Compact. Mr. Simms sent an earlier letter in which he also mischaracterized Montana law. Nov. 5, 2014 Simms letter to Attorney General Fox; Dec. 1, 2014 Lund Letter to Attorney General Fox (http://montanawaterstewards.com). Based on Mr. Simms' letterhead, he seems qualified to practice water law in New Mexico; however, when he crosses into Montana to opine on the law, it seems he has no respect, or regard, for our laws and court precedent.

1. **History of Indian Reserved Water Rights in Montana.**

Initially, Mr. Simms provides a history lesson on what he calls the relevant facts. However, in his rendition, he neglects to inform you that his facts totally ignore the Montana Supreme Court's interpretation of the key issues involved with Indian reserved water rights in Montana. In 1985, the Court decided the landmark case, *Montana ex rel Greely, et al. v. Confederated Salish and Kootenai Tribes, et al.*, 219 Mont. 76, 712 P.2d 754. In this decision, the Court extensively discussed and addressed Montana water law history, the Montana Constitution, and Indian reserved water rights The Court stated:

> Montana was admitted to statehood in 1889. As a prerequisite to admission to the Union, a federal Enabling Act required North Dakota, South Dakota, Montana and Washington to hold constitutional conventions and declare:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to ... all lands ... owned or held by any Indian or Indian tribes ... and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, ...
>
> The Enabling Act, § 4 Second; 25 Stat. 676 (1889). In response to this requirement, Montana adopted Ordinance No. 1, Second (1889), and disclaimed any right or title to Indian lands. This Ordinance was "irrevocable without the consent of the United States and the people of ... Montana." Ordinance No. 1, Sixth (1889).

Greely, 219 Mont. at 83, 712 P.2d at 758. Based on this history and the Court's decision, Mr. Simms' rendition of history is simply inaccurate for Montana. The Montana Supreme Court has recognized Indian reserved water rights and discussed Indian reserved water rights for tribal hunting and fishing. The Court stated, "[a]ny ambiguity in a treaty must be resolved in favor of the Indians." Id. at 219 Mont. at 90, 712 P.2d at 762.

Further, the Court explained the difference between State-based water rights and Indian reserved water rights:

> State-created water rights are defined and governed by state law. See Art. IX, § 3(4), Mont. Const. 1972; § 85-2-101, MCA. Indian reserved water rights are created or recognized by federal treaty, federal statute or executive order, and are governed by federal law.

Greely, 219 Mont. at 89, 712 P.2d at 762. The Court then explained, that the Montana Water Use Act:

> ...recognizes nonconsumptive and instream uses for fish and wildlife. It is sufficiently broad to allow adjudication of water reserved to protect tribal hunting and fishing rights, including protection from the depletion of streams below a protected level.

Greely, 219 Mont. at 91, 712 P.2d at 763. Also, the Court found that for the tribal uses which existed before the creation of the reservation, these uses have a "time immemorial" priority date. *Greely*, 219 Mont. at 92, 712 P.2d at 764.

Based on the history of Montana, Montana laws and Constitution, and the Montana Supreme Court's ruling, Mr. Simms has been **inaccurate** in the following statements:

- Mr. Simms wrote, "Prior to 1859, the Flathead Reservation did not exist, and the Tribes did not *own* 'all the water in, on and under the Reservation.'"
    - Actually, according to *Greely*, the Tribes owned water prior to the creation of the reservation. *Greely*, 219 Mont. at 92, 712 P.2d at 764.

- Further, in the seminal case establishing Indian reserved water rights, *Winters v. U.S.*, the Supreme Court observed that prior to the creation of the reservation: "The Indians had command of the lands and the waters, command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization." *Winters v. U.S.*, 207 U.S. 564, 577 (1908).

- Mr. Simms wrote, "The United States Supreme Court, on the other hand, has never reached any of these legal conclusions in federal reserved water rights litigation, and it is highly unlikely that the Court ever will."
  - Actually, the *Greely* Court cited several federal cases, including a United States Supreme Court case, supporting its reasoning. *See Greely, supra.*

Maybe Mr. Simms is an expert water attorney in New Mexico; however, he has apparently failed to research and understand Montana water law. Unquestionably, he has erred in the basic facts underpinning his legal opinions.

2. Inaccurate Depiction of Water Volumes in the Compact.

"Lies, damned lies, and statistics," according to Mark Twain, is a phrase describing the persuasive power of numbers, particularly the use of statistics to bolster weak arguments. Mr. Simms' use of numbers in his letter demonstrates the truth of this phrase. Further, one cannot check Mr. Simms' math or actual numbers because his source material is not provided with his letter.

It is very possible that Mr. Simms does not understand how Montana quantifies instream flow rights. On this issue, the Montana Supreme Court stated:

> The right to water reserved to preserve tribal hunting and fishing rights is unusual in that it is non-consumptive. A reserved water right for hunting and fishing purposes "consists of the right to prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies."

Greely, 219 Mont. at 93, 712 P.2d at 764. Based on the large numbers that Mr. Simms used in his letter, he must have attributed consumptive use measurements for instream flow rights. Instream flow rights are usually not measured in the same manner as consumptive use rights. Since instream flow is not a consumptive use, a flow rate is assigned based on how much flow will remain instream. Consumptive use rights typically have a flow rate and volume cap to how much water can be removed from a source and at what rate. It appears that Mr. Simms has again failed to grasp basic principles of Montana water law and has instead added all flow rates together, regardless of the type of right, to manufacture a number that support his clients' agenda, but not reality.

In addition to Mr. Simms inaccurately throwing numbers around to make his arguments, he fails to explain that the 2015 version of the Compact provides irrigators

with an enforceable right. Prior to the 2015 Compact, the irrigators had no delivery entitlement, and were subject to the whims of whomever was managing the project at the time. However, the current version of the Compact, which is up for your consideration this session, has remedied this issue with the 2013 Compact. Therefore, all of Mr. Simms' arguments related to water delivery are not only a misuse of numbers, they are also unfounded because the irrigators now will have an enforceable right that did not exist prior to the 2015 Compact.

3. Off-Reservation Flows Are Not a Conspiracy for Control.

In the third section of his letter, Mr. Simms again illustrates his ignorance of Montana laws related to Indian instream flows. Instead of relying on case law like *Greely,* Mr. Simms argued that the "Tribes' claim that they own all of the surface and ground water on the Flathead Reservation." The reality is that the Courts have found that tribes own the water on their reservations. *Greely*, 219 Mont. 76, 712 P.2d 754; *Matter of Beneficial Water Use Permits*, 278 Mont. 50, 923 P.2d 1073 (1996); *Salish & Kootenai Tribes v. Stults*, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093.

Instead of basing his arguments on correct legal principles, Mr. Simms posited a conspiracy theory that the CSKT's goal is to utilize the instream flows to control water rights. This wildly inaccurate claim is apparently intended to incite hysteria. It has no basis in reality, in law, or in fact.

4. Mr. Simms' Numbers for Acre Feet are Ludicrous.

Mr. Simms argued that the historical duty of water for the irrigation project was 4.7 acre feet per acre. It seems that his numbers were picked up from a report that inaccurately predicted potential irrigation numbers based on hypothetical outcomes after the building of the irrigation project. *See* Melissa Hornbein's February 2, 2015 letter to Sen. Chas Vincent.
(http://dnrc.mt.gov/rwrcc/Compacts/CSKT/3_letter_to_senator_vincent_response_to_simms.pdf).
If Mr. Simms would have bothered to check, he would have found that the irrigation project is in climatic area III and that water use standards indicate that a water duty of 4.7 acre feet per acre is at least an acre foot *in excess* of the highest demand in this zone. Mr. Simm's assertion is ludicrous based on the area of the project and how much water an irrigator could actually utilize on his crops.

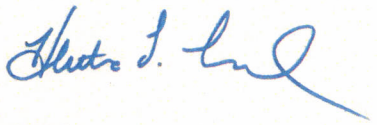
CONCLUSION

In conclusion, Mr. Simms has failed to take the time to review and/or understand Montana law related to water rights, Indian reserved water rights, and water rights adjudication. Instead, he has shown a pronounced ignorance of the compact process and underlying legal authorities in Montana.

As you know, Montana's farmers and ranchers are key contributors to Montana's number one economy, agriculture. We should not allow out-of-state attorneys with

minimal understanding or experience with Montana law to (under cover of a law degree) advocate an outcome that would severely harm agriculture statewide. Please stand strong against those who have no real interest in protecting Montanans, their property, and their economic interests. Please support the passage of the CSKT Compact.

Sincerely,



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cc. Governor Steve Bullock

CSKT Compact is Not a Taking of Water Rights

By: Hertha L. Lund for Commonsense Citizens for the CSKT Compact
2/13/2015

Many rural legislators have voiced their concerns that they did not want to vote for legislation that took anybody's property right. As they know, pursuant to Montana law, a water right that has been duly filed with the Water Court in accordance with the Water Use Act, is *prima facie* evidence of a property right, so long as the water right has not been abandoned due to nonuse. Who owns water will control much of what happens in the future in Montana. Therefore, it is very important to make sure that nobody's water rights are taken by passage of the Compact or any other piece of legislation.

Decision Tree for a Takings Analysis:

First, the court has to determine whether the claimant has a property right that can be taken by government action. Second, the court has to determine whether the government action is a *per se* taking. That is, did the government physically take the property or did the government action deprive the property of 100% of its economic value.

1. Is There a Property Right:

For a taking to occur, an individual would have to have a property right, as defined by state law. More than two decades ago the U.S. Supreme Court held that, "[p]roperty interests . . . are not created by the Constitution. Rather, they are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (*quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The Federal Circuit Court of Appeals has stated, "[t]he Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment," which interests instead are defined by "'existing rules or understandings' and 'background principles' derived from an independent source, such as state, federal or common law." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed.Cir.2003)(*quoting Lucas v. South Carolina*, 505 U.S. at 1030).

Under Montana law, in order to have a property right in water, that individual had to have filed for that water right in 1982 or 1996 pursuant to the Water Use Act. M.C.A. § 85-2-221. *Matter of Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992).

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Therefore the question is: Did any of those claiming a taking, file upon their property so that they have a property interest pursuant to Montana law? The opponents' writings are vague on this issue; however, it appears that three parties, the CSKT Tribes, the Joint Board of the Flathead Irrigation Districts, and the United States government all filed on the irrigation claims that go with the irrigation project. The Compact specifically states that nothing in the Compact changes fee owned land or authorizes the taking of any water right. SB 262, Article V(B)(7) & (24). Therefore, regardless of whether there is a CSKT Compact, any of the entities that filed pursuant to the Montana Water Use Act will have their day in the Montana Water Court during the ongoing adjudication proceedings. If there is somebody now claiming a water right in the irrigation project, who has not filed pursuant to the Montana Water Use Act, then that person does not have a property interest in a Montana water right, regardless of whether the Compact passes the Legislature.

2. What is the Nature of the Government Action:

The United States Supreme Court explained that the most important takings inquiry was the impact of the government's action on the property owner:

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in Loretto, Lucas, and Penn Central) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's rights to exclude others from entering and using her property–perhaps the most fundamental of all property interests. In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

Similar to *Lingle*, the Court of Federal Claims in *Tulare*, a case dealing with fish and irrigation water, stated:

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> Courts have traditionally divided their analysis of Fifth Amendment takings into two categories: physical takings and regulatory takings. A physical taking occurs when the government's action amounts to a physical occupation or invasion of property, including the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago, 99 U.S. 635, 642, 25 L.Ed. 336 (1878); Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 2d 868 (1982). When an owner has suffered a physical invasion of his property, courts have noted that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."

Based on this case law, the next question is what is the nature of the State's action?

The Compact is not similar to the government physically occupying the property or requiring a water right owner to give up his/her water right to the government, like in eminent domain. Further, the Compact is not similar to a regulation, like set-back requirements that take all economic use of the property. The Compact is quantifying a senior water right for the CSKT Tribes, which may have an impact on junior water rights holders; however, the government is not taking an action that can result in a physical or regulatory taking.

Conclusion:

Since if an individual water rights holder has his/her water right regardless of whether the Compact is passed, and since the government's action is not a *per se* taking of property, there is no taking as result of the CSKT Compact. The Compact is a valid use of the State's authority to quantify and settle senior Indian reserved water rights.

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The Compact Will Have Positive Impacts on the Economy

By: Hertha L. Lund for Commonsense Citizens for the CSKT Compact
2/13/2015

The Legislature's passage of the CSKT Compact ("Compact") would have positive impacts on the economy both on and off the Reservation. Water for development is difficult to find in Montana. There are nearly 60,000 square miles of the state in closed basins, over 8,500 square miles of which includes even more restrictive controlled groundwater areas. The basins that are not closed have very limited availability for new water development. Further, most of the prime water rights in the state for new development would need to go through a change application with the DNRC in order to be used for development. Unfortunately, the DNRC change application process is lengthy and typically costs tens of thousands of dollars.

On-Reservation Positive Economic Benefits:

The Compact provides for the lease of up to 11,000 acre-feet of water that can be designated by the DNRC for the purposes of mitigating new or existing domestic, commercial, municipal and industrial water users. Further, the Compact would provide, at a reduced cost, leased water to the Irrigation Project if needed during water shortages. The ability for agriculture or others to lease water will allow development on the Flathead Reservation that, otherwise, would likely not exist.

Additionally, on the Flathead Reservation, the Compact would provide certainty to the farmers and ranchers who currently depend on water from the Irrigation Project to irrigate their crops. With the 2015 Compact, on reservation irrigators have a right to receive irrigation water, which they did not have before. Further, with the 2015 Compact it is far more likely that agriculture will be kept whole instead of losing their water rights to senior Indian reserved water rights for instream flow.

Off-Reservation Positive Economic Impacts:

Off the Flathead Reservation, the Compact will provide certainty, alleviate Montana's taxpayers from having to subsidize millions of dollars more for the state-wide adjudication, and will alleviate farmers, ranchers, cities, and other water rights holders from spending millions of their own resources on legal fees. According to best estimates, if the Compact fails, Montana taxpayers will be contributing at least another $73 million dollars in order to pay for adjudication. Further, additional costs to water rights holders could be as high as *$1.8 billion*.[1]

Additionally, while the Water Court is adjudicating the estimated 10,000 claims of the Tribes, every water right that is impacted will have an uncertain status. This uncertainty will impact every appraisal. Appraisal values impact sales, mortgages and operating loan values.

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[1] 10,000 claims x 36 months for resolution of each claim (conservative estimate of adjudication time) x $2,500 -- $5,000 per month (conservative estimate of water court costs for attorney and expert).

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Majority of Irrigators on the CSKT Reservation Support the CSKT Compact

By: Hertha L. Lund for Commonsense Citizens for the CSKT Compact
2/13/15

- There are three irrigation districts making up the Flathead Joint Board of Control ("FJBC") – Flathead, Jocko and Mission Districts.

- The Flathead District is the largest with a total of 88,000 acres and five commissioners on the Board.

    - Irrigators who farm more than half of the acres of the Flathead District have signed a letter supporting the Compact.

    - Trent Coleman, a Commissioner who irrigates 626.13 acres, supports the Compact.

    - Paul Guenzler, who owns 328.15 acres, won his seat on the commission by campaigning in favor of the compact.

        - The other three Flathead commissioners irrigate a total of 707 acres.

- The Jocko District has a total of 7,000 acres and three commissioners on the Board. Kerry Doney, a Jocko District Commissioner with the largest irrigated acreage (142 acres) supports the Compact. The other commissioners own 66.3 and 18 irrigated acres.

- "If you add up the administrative fees paid by the three commissioners on the Flathead Irrigation District, who do not support the Compact, they pay a total of $3,535. I pay $6,000," said Jack Horner, a rancher who irrigates more than 1,300 acres in the Flathead Irrigation District. "It is wrong that Board members, who do not have much skin in the game can take the money that I pay and use this money against my interests."

- "Those who oppose the Compact are mostly small irrigators with little skin in the game and do not need their operations to put food on the table or to pass on something to their children," explained Paul Guenzler. "The majority of large irrigators on the Flathead support the Compact and know that it is a fair deal for irrigators."

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Passage of the CSKT Compact is a No-Brainer for Agriculture Both On and Off the CSKT Reservation

By: Hertha L. Lund for Commonsense Citizens for the CSKT Compact
2/13/2015

The Compact is Fair: It is fair to Indians and non-Indians, to irrigators and non-irrigators, to all water users and to those who live on the Flathead Reservation and off the Reservation. If the CSKT Compact were modeled more after the other Stevens Treaties Tribe's actions in other Western States, the CSKT Tribes could have negotiated for larger off-stream water rights and requested more immediate and larger instream flows on the reservation. Instead, the CSKT Tribes sought a Compact that fairly met their needs and had little negative impact on their neighbors.

The CSKT Compact is Good for the Economy: The CSKT Compact is good for the economy both on and off the reservation because it provides certainty, eliminates water rights holders from having to defend their rights in the Water Court, and it frees up at least 11,000 acre feet of water for new development.

The CSKT Compact Saves State Taxpayers and Individual Water Rights Holders Money: Without the Compact Montana taxpayers would have to pay at least $73 million for Water Court and DNRC adjudication costs, which is substantially more than the $55 million attached to the Compact, of which only $8 million would be due in this biennium. If the CSKT Tribes are forced to file their 10,000 claims with the Water Court, instead of these claims being settled by the CSKT Compact, then many water rights holders from across Montana will have to hire attorneys and re-enter the legal battles fought in adjudication. These legal battles and the reopening of the objection process would cost farmers, ranchers, cities and other water rights holders millions of dollars in legal fees.

The CSKT Compact is on Solid Legal Footing: The Compact is Constitutional and provides the irrigators on the Flathead Reservation with a delivery right, which is more of a property right than irrigators had prior to the Compact. Further, no Montana attorney with a valid license has signed a document that argues that the Compact is unconstitutional.

The CSKT Compact Would Provide Certainty: Certainty of water rights is important when farmers and ranchers pursue appraisals to secure operating or other loans.

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The CSKT Compact Would Protect Montana from ESA Impacts

By: Hertha L. Lund for Commonsense Citizens for the CSKT Compact
2/13/2015

The Legislature's passage of the CSKT Compact ("Compact") would provide protection to Montana water users from the federal government's regulatory enforcement of the Endangered Species Act ("ESA"). The Bulltrout is listed as a threatened species, which means that federal agencies have a duty to consult with the United States Department of Fish and Wildlife Service to address impacts of federal actions related to the fish and its habitat. If the Legislature passes the Compact, due to the elaborate scientific modeling conducted by the Tribes, it is highly likely that the USFWS will rely on the CSKT Tribes' in-stream flow rights as adequate to meet Bulltrout needs.

In 2010, BIA and USFWS completed a consultation and biological opinion that addressed the impacts of the operations of the federal Flathead Indian Irrigation Project (FIIP). Because the 2010 USFWS Biological Opinion is set to expire, BIA and USFWS have reinitiated consultations. FIIP operations must be covered by a valid Biological Opinion.

ESA Impact <u>With</u> the Compact:

If the Legislature passes the Compact, then it is highly likely that the USFWS will find that the CSKT Tribes' science and protections of in-stream flows needs meets the requirements of the ESA. This would mean that Montana water users would not be subject to decades of regulatory public process that would occur when the USFWS determined the biological needs of the Bulltrout. Further, due to the Compact meeting the needs of Bulltrout, Montana citizens and water users would not be subject to decades of expensive litigation caused by environmental groups due to the ESA.

ESA Impact <u>Without</u> the Compact:

If the Legislature fails to pass the Compact, then BIA and USFWS will have to develop a biological opinion without the improvements contained in the Compact. A biological opinion can take years to develop and oftentimes results in multiple lawsuits by environmental groups. In Washington State, agriculture and other water users have spent hundreds of thousands of dollars on lawsuits related to Salmon and the ESA. On a number of occasions challenging biological opinions addressing the impacts of irrigation diversions, environmental lawsuits have been successful, and when fish and agriculture or other out of stream uses compete, the fish win.

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